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Mervin J. Russell and Ada J. Russell, His Wife v. Geyser-Marion Gold Mining Company, a Corporation, The Bothwell Corporation, a Corporation, et al : Respondents' Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MERVIN J. RUSSELL and ADA J. RUSSELL, his wife,

Plaintiffs and Respondents,

vs.

GEYSER-MARION GOLD MINING COMPANY, a corporation, THE BOTHWELL CORPORATION, a corporation, et al,

Defendants and Appellants.

Case No. 10577

RESPONDENTS' BRIEF

Appeal from Judgment of the Third District Court, Tooele County, State of Utah
Hon. R. L. Tuckett, Presiding

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RESPONDENTS' BRIEF

The respondents do not agree with the appellants' statement of facts appearing in their brief under the headings "Undisputed Facts", pp. 2-7 and "Argument on the Facts", pp. 7-16. Very pertinent facts are omitted. Also, the appellants have consistently ignored facts which support the findings of the trial court, and

have relied heavily upon evidence which the trial court obviously did not believe. The respondents will be refered to as the "plaintiffs" and the appellants will be referred to as the "defendants."

STATEMENT OF FACTS

The subject matter of this litigation consists of 43 patented mining claims. One group, hereinafter referred to as the "Upper Group", consists of 12 claims located in a mountainous area north of the old town of Mercur in Tooele County; and the other group, hereinafter referred to as the "Lower Group" consists of 31 claims located on the sagebrush bench a few miles southwest of Mercur. The 12 claims included in the Upper Group are:

> Black Shale, Lot 3029, Hecla, Hecla Nos. 1, 2, 3, and 4, area 66.21 ac.; Douglas No. 1, area 27.83 ac.; Buena Vista, Gold Button, Mary Jean Fraction, Mary Jean Nos. 1 and 2, area 57.25 ac.

The 31 claims included in the Lower Group are:

> Quartet No. 1, Kansas Boy, Kansas Boy Fraction, Kansas Boy No. 3, Kansas Boy No. 4, and Garnet Mountain, area 80.973 ac.; Syndicate Nos. 1 and 2, Monopolist Nos. 1 to 8, La-Cigale Mining Dist. area 107.40 ac.; West Shore, Selma, Sister Mary, West Selma, Alice, Four o'clock, Esther, Maggie Kelly, Honest Dick, Lola Barker and Black Sheep, LaCigale, Mining Dist., area 184.27 ac.; Ivanhoe, Coin and Try Again, Albion, area 64.376 ac. in Mercur Mining Dist.

The maps, Exhibits 18, 19 and 20, show the locations of the claims.

The claims are not fenced nor otherwise marked on the ground (Tr. 27). The only ties on the ground of the Upper Group were to an area known as the "Milk Ranch" which is located at the junction of Mercur Canyon and Meadow Canyon and to the "Sparrow Hawk Spring," located in Mercur Canyon some distance north of the Milk Ranch. It will be noted by an examination of plaintiffs' Exhibit 21 that the Milk Ranch and Sparrow Hawk Spring are located immediately north and a little east of the Northwest corner of Section 5, Township 6 South, Range 3 West, SLB&M. Exhibit 21 is a topographic map and clearly indicates the canyons and springs. By referring to the sections designated on plaintiffs' Exhibit 19 which shows the mining claims and section lines, the general area covered by the Upper Group can be determined. The Hecla group consisting of 5 claims is located south and east of the Milk Ranch and the other 7 claims in the Upper Group are rather widely scattered to the north and northeast of the Milk Ranch.

Much of the testimony in the record regarding the grazing of livestock on the mining claims is general in nature. Some of the testimony is tied to the Milk Ranch and Sparow Hawk with respect to the Upper Group and to the cemetery on the bench below Mercur Canyon with respect to the Lower Group. Other testimony was based on avowed knowledge of the location of the claims.

Both parties assert ownership based on record title to the mining claims. The appellants' statement regarding the pertinent conveyances of the claims is not complete, and an agreement which preceded by a few days the conveyance of May 24, 1934 from Samuel Jorgensen and wife to Glen R. Bothwell is completely ignored. The deeds from Samuel Jorgensen and wife to Geyser-Marion and to Glenn R. Bothwell effectually severed the grazing rights from the mineral rights and thereafter the records disclose two separate chains of title. The appellants' chart and discussion of the chain of title covering "grazing rights" is not complete. The complete list of recorded documents conveying the grazing rights follows:

Grazing Rights

Parties	*Date*	*Abstract Entries*
Samuel Jorgensens to A. C. Nordell	2-11-39	110
George Jorgensens to Merlin Johnson	2-16-39	111
Merlin Johnson to A. C. Nordell	3-17-39	112
A. C. Nordell to Tony Castagno	6- 2-45	154
Tony Castagno to Rose Castagno	4-28-59	Exhibit 23
Tony Castagno to Rose Castagno	11- 2-60	Exhibit 22
Rose Castagno to Joseph Rothe	12-13-60	Supp. Abs. p. 5
Joseph Rothe to Mervin J. Russell and wife	12-14-60	Supp. Abs. p. 6

The appellants' statement of facts omits Exhibit 17 (R. 61-62) which provides:

"AGREEMENT

This agreement, made the 8th day of May, 1934, by and between Samuel Jorgensen and Mary Jorgensen, his wife, and George A. Jorgensen and Rose Jorgensen, his wife, *hereinafter* designated as the Sellers and Glenn R. Bothwell, a single man hereinafter designated as the buyer, **Witnesseth,**

WHEREAS, the sellers are indebted to the receiver of The Tooele State Bank in the sum of $11,600.00, and

WHEREAS, the buyer has submitted to said receiver an offer to pay said receiver the sum of **$7,500.00** to purchase the bank's interest in the above obligations and the securities held, which offer is being considered by the said receiver but must be submitted to the District Court for final confirmation which it is expected will be given,

NOW ***THEREFOR***, for and in consideration of One Dollar in hand paid each to the other, it is mutually agreed as follows by the parties hereto;

Sellers agree to convey to buyer upon delivery to them of all of the obligation against them now held by the bank and buyer agrees to accept such conveyance and to cancel all of such obligations in case he is able to become the purchaser as stated above, the following described property; to wit,

(Desciption of all of the mining claims involved in this suit.)

Subject to grazing rights which are reserved by the Sellers.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands,"

(Signatures and acknowledgment)

On page 5 of the appellants' brief appears the following:

"From and after 1944 Owen Ault grazed livestock on and leased all of said mining claims from and paid rental to defendant each and every year until the commencement of this action."

Statements to the same effect appear on p. 6. The writer of appellants' brief makes the statement:

"Ault ran 1400 head of sheep on said claims for 20 years, T146-11"

It will be noted by turning to page 146 of the transcript that there is no reference to running sheep on the mining claims. Page 154 of the transcript is also cited in support of a similar statement. The testimony on that page has reference only to the leasing of claims. Other references to the transcript on page 6 of the appellants' brief are erroneous and misleading. See Tr. 26, 46, 48, 53 and 159. The witnesses were testifying regarding the grazing of livestock with respect to a grazing line established by the Bureau of Land Management. The testimony did not refer to specific mining claims.

Evidence refuting the appellants' assertion under the heading, "Undisputed Facts", that the defendants'

lessee grazed livestock on the mining claims every year since 1944 is summarized below:

Owen Ault testified that he herded sheep on the Mercur Bench only three times and several times small bunches of sheep drifted down to the graveyard. (Tr. 187-189). We quote:

> "Q. Now those are the only times that you've ever had your sheep and held them on the Mercur Bench or in the vicinity of the Mercur Bench, is that right?
>
> A. When I have trailed them around there that I have told you.
>
> Q. Those three times, plus the times that some have drifted down?
>
> A. Yes." (Tr. 189).

It will be noted that 31 of the 43 claims involved in this suit are located on Mercur Bench. See Exhibit 19. (Tr. 49).

Tony Castagno never saw Ault's sheep on the Lower Group of claims. (Tr. 49).

The findings of fact, conclusions of law and decree are based on the record ownership by the plaintiffs of the grazing rights on the mining claims. They are not based on adverse use (R. 68-72).

Finding No. 3 that: "For many years last past the plaintiffs and their predecessors in interest have used the surface of said mining claims for livestock grazing" (R. 69) is supported by competent evidence. See

the transcript pages, 5-8; 46; 64; 66-88; 93-95; 96; 97; 104-107; 134.

This evidence is important to show that the plaintiffs and their predecessors were seized or possessed of the property within seven years before commencement of the action, as required by section 78-12-5 Utah Code Ann. 1953 and to show that the successive owners of the mining claims made use of the reserved grazing rights. This is one of the circumstances which supports the trial court's construction of the agreement, Exhibit 17 and the deeds dated June 7, 1932 (See Abtract, Ex. 15, Entry 103) and the deed dated May 24, 1934 (Ex. 2).

Another significant fact ignored by the defendants' statement of facts is the decree quieting title to the Black Shale claim in which the court in 1936 held that Geyser-Marion had title subject to the rights reserved by the Jorgensens in the 1932 deed. The language of the decree is:

Subject, however, to the following:

> "The rights reserved by the defendants George A. Jorgensen and Rose Jorgensen, his wife, and Samuel Jorgensen and Mary Jorgensen, his wife, in that certain deed executed by said last named persons, recorded September 19, 1932, in Book 3-S of Deeds at page 175, in the office of the County Recorder of Tooele County, Utah. and that the title of said Geyser Marion Gold Mining Company, a corporation, the plaintiff herein, to said premises, property, and mining claims is hereby adjudged to be quieted against

> all claims and demands or pretensions of the defendants, or either or any of them, said defendants and each of them being hereby perpetually enjoined from setting up any claim to said premises, property and mining claims or to any part thereof." See Ex. 15, Entry 109.

It will be noted that not only Geyser-Marion and the Jorgensens were parties to the decree, but also the administrator of the Estate of Glenn R. Bothwell, the grantee in the 1934 deed from the Jorgensens was a party. After the decree quieting title in them to the "surface rights", the Jorgensens by a deed dated February 11, 1939 conveyed the "grazing rights" to A. C. Nordell, one of plaintiffs' predecessors.

The 1932 deed to Geyser-Marion in which surface rights were *reserved* described not only the Black Shale claim, but also the other 12 claims in the Upper Group. The Hecla and Hecla Nos. 1, 2, 3 and 4 were conveyed by Bothwell to Geyser-Marion in 1934. (Ex. 15, Entry 115). This was two years before the decree quieting title.

The evidence is conclusive that the only taxes assessed against the mining claims during the period 1946 to 1960 were against the mineral rights (Ex. 6). See also the testimony of Wendell H. Anderson, Tooele County Assessor, that the surface rights on the mining claims were never assessed for taxation (Tr. 126, 127). During the trial Mervin J. Russell was asked whether he was willing to pay taxes if the court found he was obligated to pay and he answered "yes". A formal tender was made (Tr. 29).

STATEMENT OF POINTS

1. The findings of fact are supported by competent evidence.

2. The language in the Jorgensen deed reserved grazing rights which passed to the plaintiffs by deeds of record.

3. Appellants' points based on equity are without merit.

4. Statutes of limitation have no application.

ARGUMENT

1. THE FINDINGS OF FACT ARE SUPPORTED BY COMPETENT EVIDENCE.

Clotworthy v. Clyde, 1 Utah 2d 251, 263 P. 2d 420, states a settled principle in this jurisdiction regarding the findings of fact as found by the trial judge:

> "Where the trial court has looked to surrounding circumstances to determine intent because instruments of title leave ambiguity or uncertainty as to intent, the Supreme Court will not disturb the trial court's findings nor judgment based thereon unless the weight of the evidence is *clearly against* them or trial court has misapplied principles of law or equity." (Emphasis added).

The above rule that the trial court's findings of fact will not be overturned unless clearly against the

evidence has been applied by the Supreme Court in both cases of law (Jensen v. Howell, 75 Utah 64) 282 P. 1034) and cases of equity (Metropolitan Investment Company vs. Sine, 14 Utah 2d 36, 376 P.2d 940).

The Trial Court's findings of fact were as follows:

> (1) Plaintiffs are owners of the exclusive right to use for livestock grazing purposes the surface of the mining claims provided the grazing be done in such manner as not to interfere with mining (R. 68, 69).
>
> (2) For many years last past plaintiffs and their predecessors in interest have used the surface of the mining claims for grazing (R. 69).
>
> (3) Plaintiffs shall pay one-half of the taxes assessed annually against the mining claims as long as they are not used for mining purposes. Use of the land for mining would be within the knowledge of the mining company and may not be apparent to the surface users. The surface users would be obliged to pay one-half the taxes upon demand or notice (R. 69).

Taking the findings of fact separately and looking to the record it is certain that the evidence *very* clearly supports the findings.

Referring to Finding No. (1) above, plaintiffs claim their right through the grantors named in the deed, Defendants' Exhibit No. 2. That deed effectually severed the grazing rights from the mineral rights. See the chain of title to the grazing rights, page 4 of this brief. Reading the language of the deed in light of the surrounding circumstances including the agree-

ment between the original parties entered into shortly before the deed was executed (Plaintiffs' Exhibit No. 17, R. 61 and pages 5-6 of this brief) it becomes obvious that the parties to that deed intended that the grantor retain the grazing rights. The matter of the construction of the deed is more fully discussed under Point 2.

As to Finding No. (2), the testimony clearly shows possession by the plaintiffs and their predecessors of the surface of the mining claims for many years last past. See page 7 of this brief, also see the following pages of the transcript: 5-8; 46; 64; 66-88; 93-95; 96; 97; 104-107; and 134. It should be noted that defendants' leasee only had his sheep on 31 of the 43 claims three times over a period of nearly 30 years. See page 7 of this brief, see also Tr. 187-189.

On the third point, there was no evidence produced which would show that defendants gave notice to plaintiffs or demanded the payments of the taxes. It is clear that if defendants did use the claims for mining purposes this might not be apparent to the plaintiffs, because of underground operations. Defendant is in the best position to know if mining is being done on the claims or not. It should be noted that plaintiffs during the trial agreed to pay any taxes the court found they were obligated to pay and made a formal tender of the taxes (Tr. 29).

On the basis of the evidence before the court the evidence clearly supports the findings of fact and, therefore, they should not be disturbed.

2. THE LANGUAGE OF THE JORGENSEN DEED RESERVED GRAZING RIGHTS WHICH PASSED TO THE PLAINTIFFS BY DEEDS OF RECORD.

The deed through which both parties claim title, referred to herein as the "Jorgensen deed", is from Samuel and George Jorgensen and their wives to Glenn R. Bothwell and is dated May 24, 1934. It describes all of the mining claims involved in this suit and others and contains the following language:

> "The Grantee herein agrees that the Grantors shall have the right to use the surface of the ground for grazing purposes, the grazing to be done in such a manner as not to interfere with any mining that the Grantee elects to do. The Grantors agree to pay one-half of the general taxes assessed against the land, as long as it is not used for mining purposes."

The plaintiffs contend and the trial court found that the language quoted above constitutes a reservation by the grantors of the grazing rights on the mining claims; that grazing rights are property rights and that there is an unbroken chain of title to the grazing rights by deeds of record from the Jorgensens to the plaintiffs. See page 4 of this brief.

The law is well settled that the language of a deed is construed according to the intention of the parties as determined from the generally accepted meaning of the words when applied to the subject matter and

read in light of the surrounding circumstances of the parties at the time of execution.

The case of Coltharpe v. Coltharpe, 48 Utah 389, 160 P. 121, states the rule for construing the language of a deed as follows:

> "The rule of construction applicable to instruments of writing, including deeds, in this jurisdiction is that the intention of the parties, as the same is made apparent from the ordinary and generally accepted meaning of the language used by them when applied to the subject matter of the writing in light of the surrounding circumstances of the parties at the time, controls rather than mere technical words, and phrases." See also: Wood, et al, vs. Ashby, et al, 122 Utah 580, 253 P. 2d 351.

Also, the modern trend is that the intention of the parties when manifest or ascertained will prevail over all technical rules of construction. 26 C.J.S. 807; 26 C.J.S. 1011, 1012; Haynes vs. Hunt, 96 Utah 348, 85 P.2d 861.

A reservation in a deed is defined as "some right in favor of the grantor created out of, or retained in the granted premises." Dubois vs. Judy, 126 NE 104, 291 Ill. 340.

In Johnson vs. Peck, 90 Utah 544, 63 P.2d 251. this Court defined a reservation as the creation in behalf of the grantor of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant.

It will be observed that the language in the deed in question creates out of the property conveyed rights in favor of the grantors (grazing rights) which did not exist as an independent right before the grant. The language of the deed fits squarely within the definition.

What is the effect of the reservation? It carved out of the fee simple title certain rights, which thereafter may be conveyed by the grantors. The grantee did not get such reserved rights and therefore could not pass them on. It has been held:

Where a grantor reserves a right, interest, estate or easement in conveyed land the grantee and his successors in interest take subject to the restrictions imposed.

City of Missoula vs. Mix, 214 P.2d 22, 123 Mont. 365.

A right or interest reserved in a conveyance will be effective as against all who deraign title through the grantee.

Malamphy vs. Potomac Edison Co. (W. Va.) 83 SE 2d 755.

An exception of an interest in land contained in a deed is notice to the grantor and his successors.

Brown vs. Mathis (Ga.) 41 SE 2d 137.

What was the intention of the parties?

The land described in the deed is suitable for grazing on the surface and the sub-surface is suitable for

mining. The grantors of the deed, Exhibit No. 2, were ranchers and interested in having assured rights to graze their cattle. The grantee on the other hand was interested in mining and it is apparent from the language of the deed that the grazing by the grantors was not to interfere with the mining by the grantee. But, no other limitation was placed upon the grazing right.

By looking at the surrounding circumstances, it can be seen that on May 8, 1934, the grantors and the grantee of the deed in question, Defendants' Exhibit No. 2, entered into a preliminary agreement for the sale of the land, Plaintiffs' Exhibit No. 17, pages 5-6 of this brief. The language, "Subject to grazing rights which are reserved by the Sellers", clearly shows the parties' intentions. The grantor intended to convey the land, but reserved a part of the bundle of rights making up the fee—the grazing rights. And, the grantee intended to accept something less than the fee—a title subject to the grantors' grazing rights.

It is evident that both parties to the deed treated the language as a reservation which passes with the land. The Jorgensens intended to retain a property right because they conveyed it by Warranty Deed to A. C. Nordell. See Exhibit 15, Entry 110. The deed to Nordell was recorded.

The evidence shows, (Defendants' Exhibits Nos. 7, 8, 9, and 10), that after A. C. Nordell had acquired the grazing rights he paid one-half of the taxes as stipulated in the deed, year after year, and the owner of the

mining claims, Bothwell Corporation, accepted those payments. The acceptance of the payments conclusively shows that the Bothwell Corporation recognized the property right which existed in Nordell and it also shows that the Bothwell Corporation recognized that the intention of the original parties was to have the grazing rights remain with the grantors.

Looking to the language of the deed, we see that with respect to the grazing right, no specific person is named but, the general terms "grantors" and "grantee" are used. There is nothing to imply a life estate or lesser interest. Section 52-1-2, Utah Code Annotated, 1953, provides: "The term 'heirs' or other technical words of inheritance or succession are not requisite to transfer a fee in real estate." Metropolitan Investment Company vs. Sine, 14 Utah 2d 36, 376 P.2d 940, an action to quiet title by discounting a covenant in a deed, holds:

> "The words 'assigns, etc.' omitted from a restrictive covenant does not necessarily preclude a finding that the restriction runs with the land in a given case where the intentions of the parties and surrounding circumstances warrant such a finding . . . where the duration of the restrictive covenant is not specified, the covenant will be limited to such time as seems reasonable, considering the nature of the circumstances of the case and the purpose of its imposition."

Thus, it is clear that the omission of the words of inheritance in the reservation has no effect. It is still the intention of the parties which controls.

The language of the reservation contains a restriction of the grazing right. It says: " . . . the grazing to be done in such a manner as not to interfere with any mining that the grantee elects to do." Therefore, the only limitation on the grazing right is that it shall not interfere with the mining. As there is no evidence in this case that grazing interfered with the mining, it is clear that the grazing right has not been terminated. This deed indicates that it was the intention of the original parties to the deed that the grantors should have the surface grazing rights perpetually unless there was interference with mining. That this was the intention is shown by the conduct of the parties, namely, recorded conveyances of grazing rights for nearly 30 years which gave notice of the right and were not contested by Bothwell or his successors.

The decree quieting Geyser-Marion's title to the Black Shale claim, subject to outstanding surface rights in the Jorgensens, is significant in that it clearly treats such rights as property rights. It is especially important because Geyser-Marion owned all of the upper group of claims when the decree was entered. See pages 8-9 of this brief.

With regard to the agreement, Ex. 17, it was part of the surrounding circumstances at the time the deed was executed and thus could properly be considered to show the intent of the parties expressed in an ambiguous deed. 26 S.J.S. Sec. 91, p. 840, Note 2. In re Anderson's Estate, 235 P. 2d 670, 160 CA 2d 552. Standring v. Mooney, 127 P. 2d 401, 14 Wash. 2d 226.

The case cited by defendants, Knight vs. Southern Pacific Railroad, 52 Utah 42, 172 P. 693, as support for the rule that a written contract to convey real property is merged into a deed is not in point. In that case there was no ambiguity in the deed. The problem of examining extrinsic evidence to determine the intention of the parties was not involved.

Considering all of the above, plaintiffs submit that the intent of the parties at the time the deed was executed as evidence by the language in the deed, the surrounding circumstances, and the action of the parties to the deed and their successors is clearly shown to be that the grazing rights were reserved by the grantors.

3. THE APPELLANTS' POINTS BASED ON EQUITY ARE WITHOUT MERIT.

The appellant contends that the maxims of equity: "He who seeks equity must do equity" (Points VI and VII) and "Equity will not enter an order impossible to enforce" (Point X) apply in this case. It is argued that the first maxim applies because the plaintiff has not paid one-half the general taxes. The deed provides that the grantors are to pay "one-half the general taxes assessed against the land, as long as it is not used for mining purposes." The record is clear: (1) That the only taxes assessed are not general taxes but taxes assessed by the State Tax Commission pursuant to Chapter 59-6 U.C.A. 1953 against the mineral rights, and (2) That the plaintiff tendered one-half of the taxes

if the court found they were due (Tr. 29). This was clearly an offer to do equity. Further, the defendants are in no position to complain because they have collected rental on the plaintiffs' grazing rights since 1944. In the year 1944 they collected rent from Mr. Ault and one-half the taxes from Mr. Nordell! (See Exs. 7, 8, 9 and 10 and Tr. 168, 200, 204, and 260).

With respect to the second maxim, it is contended that because of the location of the mining claims it is impossible for the plaintiffs to use them without trespassing. The Lower Group of claims comprising 31 are in a single block and are adjacent to Bureau of Land Management land on which the plaintiffs have a grazing permit (Tr. 10, 11). The Upper Group are "checker boarded" with Bureau of Land Management tracts and private tracts. The undisputed evidence shows that the 12 claims in dispute are on the plaintiffs' side of a grazing line established by the Bureau of Land Management (Tr. 10, 102, 104, and 105).

Also, it is well known that practical exchanges of use of land-locked parcels are frequently made between the government and private landowners to avoid trespass.

It is apparent that the maxims of equity have no application to this case.

4. STATUTES OF LIMITATION HAVE NO APPLICATION.

The defendants contend that the plaintiffs' cause of action is barred by statutes of limitation: Section 78-12-23 (Point IV) and 78-12-5.1, 78-12-5.2, 78-12-12.1 and 78-12-12 (Point VIII). The argument in support of Point IV is that this is an action "to recover mesne profits of real property" or is an action on a written contract and is therefore barred by the six year statute. The mere statement of the argument refutes it. This is an action to quiet title to a real property right. The plaintiffs are not seeking to recover "mesne profits" from the defendants nor from Ault. The only issue is the ownership of grazing rights.

With respect to Point VIII it is assumed by the defendants that the defendants because they leased the grazing rights to Ault had "exclusive possession", that therefore the plaintiffs and their predecessors had no possession and that therefore the plaintiffs were not in possession within seven years and had no standing to bring suit. It is also apparently argued that the plaintiffs have not acquired title by adverse possession because they have not paid taxes and been in exclusive possession for seven years.

The competent evidence of the grazing of sheep and cattle on the unfenced claims is set out in the statement of facts. This constitutes possession to meet the requirements (possession within seven years) of the only statute of limitations which is at all applicable,

Section 78-12-5 and this statute was not pleaded and therefore cannot be considered. See Rule 9(h), Utah Rules of Civil Procedure. See also Tanner v. Provo Res. Co., 78 Utah 158, 168, 2 P.2d 107.

CONCLUSION

The trial court's ruling that the grantor intended by the ambiguous Jorgensen deed to reserve grazing rights is supported by competent extrinsic evidence consisting of (a) the practical construction by the parties, (b) the recognition of Bothwell Corporation of grazing rights subsequently conveyed to Nordell, (c) the eight deeds of record conveying grazing rights from the Jorgensens to the plaintiffs over a period of thirty-years which were never attacked by Geyser-Marion or its predecessors, (d) the use of the mining claims by the plaintiffs and their predecessors including the Jorgensens from 1934 to the commencement of this action and (e) the unambiguous agreement, Ex. 17, dated a few days before the Jorgensen deed and as a part of the same transaction which spelled out specifically that the grazing rights were reserved. The judgment of the trial court should be affirmed.

Respectfully submitted,

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